IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

REGULAR SECOND APPEAL NOS.619 AND 910 OF 1984

DATE OF DECISION: MAY 14, 2007

Biru

.....Appellant

VERSUS

Nanhi

....Respondent

CORAM:- HON'BLE MR.JUSTICE RANJIT SINGH

1. **Whether Reporters of local papers may be allowed to see the judgement?**
2. **To be referred to the Reporters or not?**
3. **Whether the judgment should be reported in the Digest?**

PRESENT: Mr. Radha Krishan Battas, Advocate,
for the appellant.

Mr. R. S. Dhull &
Mr. Ramesh Hooda, Advocates,
for the respondent.

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RANJIT SINGH, J.

Appellant, a simpleton, has been taken for fraudulent rides by his own people, his relatives, which include his wife. What would have been his fate, if he had not been having 10 acres of land on his name? None seems to be interested in this simpleton, but all have made real efforts at his land. Unmindful of his condition, statedly a `***bholabhala'***, in layman language, the Courts have also not been kind to him and have failed to check and correct the fraud being played with him. As a result, he is before this Court in aforesaid Regular Second Appeals and is fighting to save his land. Perhaps upon this would depend his survival. His appeals, filed before this Court, are pending

since 1984 and perhaps may have remained confined as one of the pending cases and so too the fate of this simpleton but for a chance impatience shown by the respondents and real vigilance by learned counsel for the appellant, Sh.R.K.Battas. An innocuous approach to file an application saying that the parties have reached compromise for giving some part of the land back to Biru out of the decretal property, has revealed the real plans behind the move to deprive appellant, Biru, of his property. While drafting the compromise deed, Biru was brought to the learned counsel, who could notice that Biru had absolutely no capacity to understand his interest and good or bad for him. The counsel also noticed that the health of Biru had further deteriorated during last two decades of pendency of these appeals. He otherwise was noticed as simpleton in the record of the case and had earlier been defrauded by his wife. This man was made to loose his entire land to his wife. He was, thus, dependent upon his nephew Baldev Singh, who had brought him to the learned counsel. Showing full sense of responsibility expected from a counsel, Mr.Battas, moved an application for appointing next of friend of the appellant as he found him not to be in a position to enter into any compromise due to his weak mental health.

When notice of the application was issued to the respondent, the efforts on the part of relatives to deceive simpleton Biru, started surfacing. Initially, on 4.12.2006, a statement was made before the Court that respondent-wife was willing to transfer the entire property back to her husband. The parties were accordingly summoned to be present in Court. On 21.12.2006, the counsel representing the wife pleaded no instructions. The Court accordingly

observed that wife appeared to be backing out of the statement made on her behalf on 4.12.2006. She was directed to be served through S.S.P., Jind. When she finally appeared before the Court on 15.2.2007, it transpired that respondent Nanhi had re-married about 14 years ago and was not living with Biru. Though she had left Biru long long ago, but had still not left the greed about the land which she had succeeded in getting transferred on her name. Since she had been restrained from alienating the property in dispute during the pendency of the present appeals, she apparently seems to have connived with other relations of Biru to share the spoils with them by reaching a compromise and by transferring some portion of the land back to appellant Biru. The part so transferred would then simply go to the relatives of Biru with whom he is now staying, he being not in position to enjoy the property being not fully mentally fit. The respondent-wife, who has deserted Biru about 14 years ago, would have got portion due to this compromise, a perfect scene to deceive an innocent person. All this would have resulted but for the vigilance shown by Sh.Battas, who needs appreciation for performing his duty as a counsel with such diligence and ethics which helped the Court in seeing this move through and through. Keeping these peculiar facts in view, it was decided to hear the main appeal instead of passing any order on the application for disposing the appeal due to alleged compromise.

No question of law was formulated at the time of admission of these appeals and Mr.Battas has now framed the following substantial questions of law that would arise in this case:-

" 1. Whether finding of fact contrary to evidence raise

substantial question of law?

2. Whether court's failure to appreciate material evidence would amount to non-application of mind and would it raise substantial question of law?

Mr.Battas has referred to ***Major Singh Vs. Rattan Singh (Dead) by LRs and others,*** AIR 1997 Supreme Court 1906 to say that rejection of evidence by lower Court on flimsy grounds would involve a substantial question of law. He would also refer to ***Ishwar Dass Jain (Dead) through LRs Vs. Sohan Lal (Dead) through LRs***, 2000 (1) RCR (Civil) 168 to say that when material or relevant evidence is not considered which, if considered, would have led to an opposite conclusion, then it would be a substantial question of law, requiring adjudication. In this background these two appeals are being decided together as these are directed against two judgments and decrees passed by lower appellate Court arising out of the common dispute.

The facts necessary to notice for deciding both the appeals are that Biru had filed a suit against his wife Nanhi, seeking declaration to the effect that judgment and decree dated 3.10.1980 passed in Civil Suit No.278 of 3.10.1980 titled Smt.Nanhi Vs. Biru passed by Sub Judge Ist Class, Narwana, was illegal, based on fraud and undue influence and as such, not binding on him (the plaintiff). A decree for permanent injunction, restraining the defendant Nanhi, his wife, from alienating the suit land was also sought. The appellant, who is a owner in possession of half share of the agriculture land measuring 160 K 8 M, was defrauded by the respondent-wife, who got a decree dated 3.10.1980 passed in her

favour for transferring entire share of land to her, which was standing on the name of appellant. On learning about it, the appellant filed the suit claiming the decree to be illegal, void and not binding on his rights. He further pointed out in the suit that he was having a joint Khewat with Phulla and Ratia sons of Jawhara. There was some dispute amongst the co-sharers. Respondent Nanhi had taken the appellant, Biru, to the Courts at Narwana on 3.10.1980, saying that the suit land was to be partitioned with his co-sharers. She obtained thumb impression of the appellant on blank papers and obtained the decree impugned in the suit by practicing fraud and undue influence on him by getting a decree in her favour transferring the entire land on her name. It is further averred in the suit that no family partition had in fact taken place, as alleged in the previous suit and the possession had also not been delivered to respondent Nanhi. To show haste on the part of the respondent, it is pleaded that decree for agriculture land measuring 160 K 8 M was sought whereas the plaintiff was owner of ½ of the land measuring 160 K 8 M. Fearing that respondent was likely to alienate the suit property, the suit was instituted by the appellant. Respondent wife resisted the claim of the appellant by justifying the decree dated 3.10.1980 being valid, legal and binding on the rights of the parties. The allegations of fraud and undue influence were denied. The plea raised on behalf of the appellant that he was a simpleton was also denied and it was stated that he is a man of prudent mind and had voluntarily got this decree passed. She further claimed that she constituted a joint Hindu family with the appellant, who was bent upon to dispose of the suit land and so the parties had reached an oral family partition in the presence of

respectables and relatives about a year prior to the filing of the previous suit. It was also claimed that suit land had been allotted to the respondent-wife and was in her possession as an owner. She also claimed right to dispose of the suit property being an absolute owner of the same according to law. Other pleas in regard to estoppel on the part of appellant to challenge the decree and about maintainability of the suit was also raised. From the pleadings of parties, following issues were framed:-

1. Whether the judgment and decree dated 3.10.1980 in civil suit No.279 of 1980, Smt.Nanhi Vs. Biru is illegal, void, based on fraud and is not binding on the rights of plaintiff? OPP

2. Whether the suit is not maintainable in the present form? OPD

3. Whether the plaintiff is estopped from filing the present suit by his own act and conduct?OPD

4. Whether the plaintiff has no cause of action to file the present suit? OPD

5. Whether the plaintiff has not given the particulars of fraud? If so, its effect? OPD

6. Relief.

The trial Court, after analyzing the evidence led by the parties, came to the conclusion that suit land was proved to be in possession of respondent, Nanhi, though entries were in favour of appellant, Biru. The trial Court then went on to consider the next question to see if the respondent had become owner of the suit land or not? The trial Court, this time, was not that generous to the

respondent and held that she is not proved to be an absolute owner of the suit property and at the most, she could be held to have possessory rights over the suit land. Thus, interpreting the decree dated 3.10.1980, the Court held that respondent, Nanhi, is in possession of the suit land and had legally not acquired the ownership right over the same. As a result thereof, the suit was partly allowed and a decree of permanent injunction, restraining the respondent from alienating the suit land was passed in favour of the appellant but a declaration sought by the appellant to the effect that the judgment and decree dated 3.10.1980 was illegal, void and not binding on his rights was dismissed. Aggrieved against this judgment and decree, appellant, Biru and the respondent Nanhi filed separate appeals, which were heard and decided by the Additional District Judge, Jind, on 16.1.1984. The Appellate Court, after noticing various arguments raised on behalf of the parties held that decree dated 3.10.1980 was not proved to have been suffered because of any fraud. The lower Appellate Court thereafter proceeded to determine the value of consent decree and set-aside the finding of the trial Court whereby it had held that the respondents had not become owner of the suit land being incorrect and instead held that she had become owner of the land and could alienate the suit property. Consequently, the appeal filed by the plaintiff-appellant was dismissed and that of defendant-respondent was accepted. Biru, has accordingly filed these two appeals before this Court to challenge the judgements and decrees passed by the lower Appellate Court.

Attacking the finding of the trial Court as well as the lower Appellate Court, Mr.Battas submits that the appellant is mentally ill

person and his condition has further deteriorated by now. He points out that the respondent-defendant was living at her Village Makhand, where she took Biru before taking him to Narwana to get a consent decree passed in her favour on 3.10.1980. To strengthen his submission regarding fraud in obtaining this decree, Mr.Battas would say that appellant Biru was taken to the Court on 3.10.1980, the suit was drafted on the same day itself, written statement was also prepared and filed in the Court on the same day, statement of the appellant was also recorded before the Court on the same day and it was decreed on that day itself. Learned counsel would also point out that Advocates appearing for both the sides were practicing together and as such, would urge that it is a clear-cut case of collusion to defraud a simpleton, who was not in a position to understand the consequences of his acts. As per the counsel, the appellant was taken to the Courts at Narwana by making representation to the effect that signatures were needed for partition of the land with his co-owners. He would find serious fault with the stand of respondent-wife wherein she claims that she has become owner of this land by way of a family settlement. The counsel seems to be justified in submitting that the Courts failed to appreciate that there can be no family settlement amongst the family members where the owner is deprived of the entire property and is made a destitute dependent upon others. Partition has to be made where portions are assigned to members of families. How could the act be termed as a partition, where not even an inch of land was left with the appellant-owner and entire property was grabbed by the respondent-wife for the benefit of her paternal relations. The counsel is justified in asking a question if

any person would agree to part with entire land by way of partition. As is now revealed, she has also re-married and is living with another person having children. She still would not consider it appropriate to leave this property for simpleton, her husband with whom she would attempt to maintain relationship of wife saying that second marriage is no marriage in the eyes of law. Having taken the property in the manner she is trying to settle herself in life, leaving appellant to lead a life of destitute.

The argument raised by counsel for the respondent-wife that second marriage would not be a marriage in the eyes of law in view of the earlier marriage subsisting between her and the appellant needs to be viewed with disgust. This will also show a desperation on the part of the respondent to somehow retain the land obtained by her by playing fraud on the appellant. Even if the second marriage is no marriage in the eye of law and marriage between the appellant and respondent is still subsisting in law, then also she can not claim any equity or any legal justification in her favour. The judgment and decree impugned in the present appeals are required to be decided on the basis of evidence and material placed on record. It is not much in dispute that the appellant is a simpleton and of a weak mind. This is proved by evidence of two witnesses examined before the Court and these are Phulla PW1 and Chatra PW2. Phulla is a Lambardar of the village, who clearly deposed before the Court that appellant is a simpleton while the defendant is a clever lady. So too was the evidence of Chatra (PW2). The appellant also appeared as a witness and testified that he was called by the defendant-wife and her father on the pretext that the suit land is to be got partitioned

from other Phulla (not PW1), his collateral, who was encroaching upon the suit land and his thumb impressions were accordingly obtained on the pretext of getting the suit land partitioned. Reference can also be made to Ex.D3/A where respondent herself has described the appellant as "***kam akal ka bhola aadmi"*** (simpleton with less sense) in the FIR recorded by her. Even the witnesses also deposed that Biru "***moti akal ka bhola bhalla admi hai*** (simpleton with less sense). In order to get over this, respondent-wife clearly stated that now the appellant was all right. In fact, Biru cannot be termed to be having right senses. Even this fact could be observed and noticed by me when he appeared on one of the dates before this Court. A consent decree, where suit is drafted, filed, written statement obtained, oral statement recorded and decree passed could be termed as fraud, especially so in the background that appellant is a simpleton and was not in a position to fully understand the consequences of his action. As already noticed, the counsel, who appeared for the parties, were also practicing together. In this regard, Mr.Battas drew my attention to the cross-examination of DW1, who, despite conscious efforts on his part, could not dispute that both the counsel had been appearing together in number of cases and even had a common vakalatnama (power of attorney). In addition, it is pleaded that it is not a case of a partition. Here is a case where the entire land owned by the appellant was allegedly transferred on to the name of the respondent. As per the counsel, it would amount to gift. The gift to be effected would compulsorily need registration and since this transfer, which would deemed to be a gift, is not registered, the respondent, under no circumstances, would acquire an

ownership right over this property. The approach adopted by the lower Appellate Court has also been seriously criticised by learned counsel for the appellant. Even after having noticed that respondent had made an admission in Ex.DW3/A that appellant was simpleton and that admissions are binding, the lower Appellate Court went to ignore this important aspect about the condition of the appellant and relied on the statement of Surinder Pal Singh DW1, engaged as a counsel by the appellant to hold against him. The lower Appellate Court apparently failed to notice the nexus between both the counsel. It is not understood as to how the lower Appellate Court failed to notice the cross-examination of DW1, which would sufficiently indicate that he was working with the counsel representing the defendant and had also been engaged by the defendant. His version accordingly could not have given assurance to the court to discard even the admission of respondent proved on record. This could not be sufficient to discard the positive evidence brought on record in the form of an admission of the defendant, which is duly supported by two independent witnesses i.e. PW1 Phulla, Lambardar and PW2 Chatra. It was also noticed by the lower Appellate Court that admission made by a party can be used against him and need not even be put to him as laid down in ***Biswanath Prasad and others Vs. Dwarka Prasad and others***, AIR 1974 SC 117, yet it held against the appellant that he had transferred the land as partition. The respondent could not be allowed to get out of her admission, moreso when she did not make any effort to explain the admissions made by her. It is also required to be noticed that defendant was not living with her husband and had taken him to the house of her

parents from where he was brought to Narwana to get this consent decree passed within one day. What was the tearing hurry on the part of the Court, counsel and the respondent to see this decree coming in one day. It would defy any explanation. It also cannot be ignored that the appellant was taken on the pretext of getting the suit land partitioned with his collateral and on that pretext his thumb impressions etc. were obtained. Because of his condition, respondent-wife was in total dominating position over the appellant. By referring to the case of ***Govinda Naik Gurunath Naik Vs. Gururao Puttanbhat Kadekar since deceased by L.Rs. Mrs.Padmavathi Gururao Kadekar and others,*** AIR 1971 Mysore 330, Mr.Battas would say that the Courts are to consider whether the person is in a position to dominate the will of the other person and whether in fact dominated the mind of the person who was of a weak mind and further that whether he could have had no independent advice to enable him to arrive at an independent judgment. Seen in this context, he would plead that the appellant was certainly a person of weak intellect and was in a position to be dominated by the respondent who did so by taking him to her parents' house before bringing him to the Court at Narwana, where, due to some prior arrangement, everything was done within one day. It is not a case where the respondent is seen to have acted in a good faith that the allegation of fraud made can be ignored. This is a case where proved circumstances are not compatible with the hypothesis of the respondent acted in a good faith. The allegations of fraud levelled against her, in my view, are made out. As held in the case of ***Thangachi Nachial and another Vs. Ahmed Hussain Malumiar***

and others, AIR 1957 Madras 194, fraud by its very nature is a secret in its origin and inception and the means adopted for its success and fraudulent motive or design can not be proved to the very hilt and it would be inferred from the circumstances placed before the Court. Each circumstance in itself even may not mean much but taking them together, they may reveal a fraudulent or a dishonest plan. The circumstance indicating that the appellant is a simpleton, a fact which was admitted by the respondent and was mis-led in putting his thumb impression on papers on the pretext of getting the land partitioned with collateral, coupled with the pre-arranged plan to engage counsel and to draft suit, file it, get the statement recorded and decree on one day, when viewed together would establish the fraud and collusion as alleged by the appellant. Mr.Battas has also drawn my attention to the case of ***Hamelo (Deceased) Vs. Jag Sher Singh,*** 2002 (2) Civil Court Cases 487 (P&H) to say that burden of proof in this case would be on the defendant to show the absence of fraud, mis-representation and undue influence, as concededly, she was in a dominating position vis-a-vis the appellant. The respondent would not be in any position to explain as to why the appellant had agreed to transfer his entire land on her name; what is to happen to him; why subsequently she had agreed to return part of land or whole land to the appellant during the pendency of these proceedings; why did she later on back out from the statement made on her behalf; why she was ready to part with 30% of the land even during the course of arguments etc. These are the questions, which would not find an easy answer. The assertion made by learned counsel for the appellant that compromise

can be only to resolve bonafide dispute and the present decree or a document is a camouflaged and as such, to be treated as a gift, registration of which would be necessary for its enforceability can not be ignored. In this regard, the counsel has referred to the case of ***Sumintabai Ramkrishna Jadhav Vs. Rakhmabai Ramkrishna Jadhav and others,*** AIR 1981 Bombay 52. He would seek support from the case of ***Ranbir Singh Vs. Shri Chand,*** 1984 PLJ 562, where it was held that consent decree, which have effect of transferring land without registered deed does not confer a valid title. It was further held that the decree would operate as an instrument of gift of immovable property and as such, would not be exempted from registration.

Assessing the case in the totality of the facts and circumstances, it can be seen that the judgments and decrees passed by the trial Court as well as the Appellate Court can not be sustained. I am of the considered opinion that on the basis of evidence led by the appellant, he has succeeded in proving with sufficient assurance the allegation of fraud. The respondent had left the appellant as a destitute and has settled with another person as a married lady. The evidence would not in any manner show that she had become absolute owner of this property. Even if everything is to be considered, then also this is not a case of partition as the appellant was deprived of the entire land, leaving no share with him and such an arrangement can never be termed as a `**partition'.** This arrangement, more appropriately, could take the shape of a gift and since it was not registered, which is compulsory under law, the gift would also not be a valid one in this case to entitle the defendant to

have any right over the property in dispute.

Accordingly, both the appeals are allowed. The judgment and decree dated 16.1.1984 passed by lower Appellate Court is set-aside and the suit filed by the plaintiff is decreed.

Since it has been found that the appellant is a simpleton and a man of less intellect, who is not in a position to look after his interest, he can not be left to be again defrauded in future by any of his relatives. To over come this situation and to make proper arrangement for the appellant, Mr.Battas drew my attention to the provisions of Section 52 of the Mental Health Act, 1987 (hereinafter referred to as "the Act"), which makes for a provision for appointment of a guardian of mentally ill person and for appointment of a Manager of his property. Section 52 reads as under:-

> "52. ***Provision for appointing guardian of mentally ill person and for manager of property.-*** (1) Where the District Court records a finding that the alleged mentally ill person is in fact mentally ill and is incapable of talking care of himself and of managing his property, it shall make an order for the appointment of a guardian under Section 53 to take care of his person and of a manager under Section 54 for the management of his property."

Thus, a guardian of a mentally ill person can be appointed by a District Judge, when Court finds that such a ill person is incapable of taking care of himself. Section 54 of the Act makes a provision for appointment of a Manager for management of the property of mentally ill person. Section 55, on the other hand, makes enabling provisions for a Collector to appoint a Manager of a

mentally ill person. Though it has been observed that the appellant is not fully sound in mental health and concededly, is a simpleton, I would still direct the District Judge, Jind, to hold the necessary judicial inquisition about the mental condition of the appellant as required under Section 50 of the Act, by treating this order as necessary application and thereafter to act and appoint a guardian and/or a Manager to manage the property of the appellant. The District Judge is requested to ensure that adequate provisions for safety of the property of the appellant are made so as to avoid any fraud being played with him in future. Let copy of the judgment and the case file be sent to the District Judge, Jind, for passing appropriate orders under the provisions of the Act.

May 14, 2007 **(RANJIT SINGH)**
khurmi **JUDGE**